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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 438

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

THE SINGER MANUFACTURING COMPANY,
Defendant-Appellee.

BRIEF OF THE SINGER MANUFACTURING COMPANY, DEFENDANT-APPELLEE, WITH RESPECT TO STATEMENTS CONTAINED IN THE GOVERNMENT'S BRIEF IN OPPOSITION TO MOTION TO AFFIRM

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The Government's Brief in Opposition to Singer's Motion to Affirm, in six pages, sets forth 8 statements that are erroneous, misleading or plain misstatements. Each of them is with respect to an important point. We do not herein attempt to make any further argument or answering argument, except as to item 9 below dealing with a new matter raised by the Government in its opposing brief, attempting to limit ourselves to such statements as are necessary to correct or refute the statements so made by the Government.

1. The Government asserts (Br. Opp., p. 2)[1] that its charge of a conspiracy and an attempt to monopolize draws its main strength from the "undisputed fact" that Singer entered into the Singer-Gegauf assignment agreement to acquire Gegauf patents "for the express purpose, which it communicated to Gegauf, *of excluding* from the United States market *its primary competitors*, manufacturers and distributors of Japanese-made machines." (Emphasis supplied) The fact is, and the trial court found, that Singer acquired Gegauf Patent No. 1 for the purpose, and only for the purpose, of excluding sewing machines *infringing* that *specific patent* and that Singer's intention related not merely to Japanese-made machines but to all machines *infringing* that *specific patent* (Op. 52a-53a, 55a, 73a-74a). The Government knows this well and so argues when such an argument suits its convenience (p. 5). Insofar as the Government's statement relates to Gegauf Patent No. 2, it is made squarely in the teeth of a contrary finding by the trial court (Op. 55a).

The Government's statement, however, is not even limited to an erroneous statement as to what the trial court found. It states that the fact asserted by it is an "undisputed fact." An undisputed fact means that Singer does not dispute it. In view of the position taken by Singer throughout this case that Singer acquired Gegauf Patent No. 1 to enforce it against machines infringing that specific patent and that Singer acquired Gegauf Patent No. 2 with the motive and for the purposes set forth by the trial court in its opinion (Op. 55a), it is nothing short of a disregard for the truth to assert that Singer does not dispute the Government's contention.[2]

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1. Unless otherwise indicated page references are to the Government's Brief in Opposition to Singer's Motion to Affirm.

2. It will be remembered that the facts set forth by the Government in its Jurisdictional Statement were asserted to be "not in dispute" (J.S. 4).

2. The Government asserts (p. 2) that the trial court reiterated throughout its opinion the above set forth "undisputed fact" and cites seven pages of the opinion. Not a single citation supports the statement. The trial court, to the contrary, found that Singer acquired Gegauf Patent No. 1 to enforce it against machines infringing that specific patent (Op. 52a-54a, 73a-74a) and that it acquired Gegauf Patent No. 2 for a purpose wholly unrelated to enforcement (Op. 55a).

3. The Government adds to its alleged "undisputed fact" the assertion that the trial court made a *finding* that Gegauf "entered into" the acquisition agreement "for the identical purpose of facilitating the exclusion of the competing Japanese machines from the United States market and thus strengthening its position *vis-a-vis* the Japanese in Europe" (p. 2). No one of the Government's citations to the trial court's opinion discloses any such finding. No such finding was made by the trial court.

Not once did the trial court state the motivating force or purpose finally inducing or persuading Gegauf to enter into the assignment agreement. Exactly contrary to the statement made by the Government, the trial court expressly found with respect to Singer and Gegauf:

> "It is most striking that, throughout, their dealings were characterized by an absence of unity or identity of *any* common purpose or motive." (Op. 52a; emphasis supplied)

The Government's statement as to the trial court's finding is refuted *in toto* by the findings which in fact are made on pages 52a-53a of the trial court's opinion.

The trial court of course set forth in various places in its opinion quotations of statements made by Gegauf at

various times in the course of bargaining with Singer for the best terms Gegauf could obtain. They were not findings and were not intended as findings as to the motivating purpose or intent with which Gegauf entered into the assignment agreement. One could as well argue that the trial court's finding that Gegauf demanded and received $90,000 in cash was an "express finding" of Gegauf's motive and intent. We think it quite clear that the $90,000 was the motivating force behind, and the purpose for which Gegauf made, the assignment. We do not, however, have the temerity to state to this Court that the trial court "expressly" so found or that it is an "undisputed" fact.

4. The Government attempts to make it appear that the trial court *found* that Singer had a specific intent to bar from the United States not only "all" machines infringing Gegauf Patent No. 1 but "all" machines infringing any of the other four patents, the Harris reissue, Perla, Johnson or Gegauf No. 2. This attempt is made by the process of first referring to the fact that in addition to Gegauf Patent No. 1 and Gegauf Patent No. 2 Singer had "its own patents" (meaning the Harris reissue, Perla and Johnson patents) (pp. 2-3) and then, by footnote (p. 3), stating that the Government, on the attempt to monopolize issue, relies upon the trial court's *finding* "that Singer had a specific intent to bar *all* infringing machines from the United States market," citing the trial court's opinion at page 74a. The trial court, however, was clearly speaking of Singer's attempt to exclude "all" machines *infringing Gegauf Patent No. 1.* There is not the slightest possibility of any misunderstanding of this fact. The trial court was dealing with the Tariff Commission proceeding which related solely to Gegauf Patent No. 1.

The trial court had stated that the Tariff Commission proceeding had been brought by Singer in a bona fide attempt to obtain protection for its 401 machine by an order "excluding *all* unlicensed machines *which infringed on Gegauf I patent*" (Op. 73a-74a; emphasis supplied as to last six words; see also Op. 55a).

The Government thus cites page 74a to support an assertion by it which is completely negated by the material on page 73a, which together with the material on page 74a constitutes a single paragraph.

5. The Government asserts (p. 4) that Singer suggests that in practical effect "there is no combination of patents involved here" because, during the period from 1957 to 1959, enforcement of Gegauf Patent No. 1 and Gegauf Patent No. 2 alone would have resulted in the exclusion of almost the same number of machines as could have been excluded by the Gegauf patents plus Singer's three other patents (the Harris reissue, Perla and Johnson patents[3]). It adds (p. 4) that Singer, for example, "asserts that in 1959 the three Singer patents could have excluded only an additional 800 machines, totaling .0031 of the domestic multi-cam market."[4] The Government is

3. The Government refers to the Johnson patent as a patent "covering" the 401 machine. In fact, Gegauf Patent No. 1 covers the 401 machine and the Government has so stipulated (Op. 40a; Stipulation of Facts, Par. 93, R. 2470). The Johnson patent does not cover the multiple cam mechanism of the 401 machine. It covers only an ancillary feature of the 401 multiple cam mechanism, the use of a second cam follower (Stanford, R. 1203-1205), which could easily be eliminated, leaving Singer with no remedy against a multiple cam mechanism embodying the basic feature of its 401 machine.

4. The Government omits reference to the following information which was set forth by Singer: The Harris reissue, Perla and Johnson patents combined would have excluded no additional machines in 1957, 249 in 1958 and 800 in 1959. The aforesaid number of excluded machines would have represented, respectively, the follow-

confused. If it appeared that a single drop of water had been added to Lake Michigan we would recognize and acknowledge "the combination." We however would challenge every Government assertion that the court "found" or that it was an "undisputed fact" that it would effectively supplement Chicago's water supply.

What Singer said was:

> "It would seem patently absurd to picture Gegauf as conspiring with Singer to get Gegauf's patents into Singer's hands so that it could get the benefit of the additional restraining power of Singer's patents, in combination with its own, when the additional restraining power, supposed to be such a tremendous inducement to Gegauf, consisted of the power to exclude from the United States no machines in 1957, 249 in 1958 and 800 in 1959. This is all the more so when it is realized that there is no evidence that Gegauf ever heard of the Johnson application or the Perla patent and there is evidence that it had not heard of them (Dx. 31, R. 5235)." (Motion to Affirm, p. 11)

The Government waxes enthusiastic (p. 4) over the number of machines which it asserts, without any supporting evidence, *might have been* manufactured using only the ancillary feature of Singer's 401 machine without at the same time infringing Gegauf Patent No. 1. It obviously has no such enthusiasm with respect to the large and rapidly growing quantity of non-infringing multiple cam machines which, as established by the evi-

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ing portions of the household sewing machine market in the United States and multiple cam machines in such market: In 1957 0 and 0, in 1958 0.00015 and 0.0011, and in 1959 0.0004 and 0.0031 or, in other words, in 1959, 4 out of every 10,000 household sewing machines or 31 out of every 10,000 multiple cam sewing machines (Motion to Affirm, p. 10).

dence, are being manufactured and sold, or with respect to the unlimited quantity of such machines which, as established by the evidence, *could have been* and *now may be* manufactured by any sewing machine manufacturer, including the four manufacturers in Japan who prefer to infringe Gegauf Patent No. 1 (Motion to Affirm, pp. 26-28).

6. (a) The Government asserts (p. 5) that Singer urges that there can be no question here of a conspiracy or combination to exclude from the American market any competing machines other than those of Japanese manufacture. This fails to distinguish between the scope of the conspiracy *alleged by the Government* and the scope of Singer's intent and purpose *as established by the evidence*. It is perfectly obvious on reading Singer's Motion to Affirm, pages 13-14, that we were there referring to the scope of the conspiracy *as alleged and contended* by the Government. We pointed out, and the Government now concedes, that the Government's allegation and *claim* related solely to competing machines of Japanese manufacture. On the other hand, with respect to the scope of Singer's intent, purpose and actions, we pointed out that the evidence and the findings by the trial court establish Singer's intent to exclude only machines *infringing Gegauf Patent No. 1*.

The Government urges that limiting the scope of the alleged conspiracy, by resort to the Government's allegations and contentions, cannot benefit defendant (p. 5). We disagree completely. It obviously benefits Singer, and we submit that it aids this Court, when the Government argues an issue that is involved in the case rather than an issue that is not involved. The Government now

has grudgingly gone part way. It has finally gotten around to using the word "infringing" in isolated instances. It still finds it difficult to refer to machines "infringing Gegauf Patent No. 1." It, accordingly, completely misstates the finding by the trial court when, in the first sentence of the second full paragraph on page 5, it states that the trial court "expressly found" that "Singer sought to exclude from the United States market all infringing machines, not merely machines of Japanese manufacture," citing pages 48a and 74a of the trial court's opinion. There was no such finding by the trial court. Singer's desire, intent and actions were directed to the exclusion of machines *infringing Gegauf Patent No. 1.* The trial court so found (Op. 55a, 73a-74a).

(b) The Government, having argued as above indicated for almost an entire page that the conspiracy alleged by the Government involved machines *other than Japanese-made machines* and having almost convinced itself that the trial court *may* have intended to so find, in the face of the Government's repeated statements to the trial court that the Government made no such charge and that no such conspiracy existed, ultimately concedes that no issue as to machines other than Japanese-made machines is involved in the conspiracy allegation (p. 5). It now concedes that there was no justification for its reference to "other imported machines" in its first question. It apparently does this reluctantly and begrudgingly and without acknowledging that the use of those words was likewise unjustified at pages 15, 18 and 19 of its Jurisdictional Statement. It thus prefers to continue elsewhere the vendetta commenced, but now abandoned, in its first question. Furthermore, the Government would now pretend that the conspiracy charge was

confined to machines of Japanese manufacture "at the time" of the trial. The fact is that the charge was so confined in the complaint and throughout the entire proceedings. It had never been otherwise until the additional claim was injected into the case in the Jurisdictional Statement.

We suggest that while about it the Government might likewise have conceded that it altered the format of a document submitted to this Court (J.S. 6-7; Motion to Affirm, pp. 33-34), and that there is no justification for its statement that a finding of the trial court as to clause 1 of the Singer-Gegauf license agreement conflicted with "documents written by employees of Singer" interpreting such agreement (J.S. 24, n. 20; Motion to Affirm, p. 34). In our Motion we called attention to the fact that the Government neither specified nor cited any such document. In the face thereof the Government refrains from citing or specifying any such document in its answering brief.

7. The Government, in footnote 2, page 6, concedes that in its Post Trial Brief it expressly stated to the trial court that the Government's contention was that "the provision" of the Singer-Gegauf license agreement which was unlawful was the provision contained in the first sentence of clause 1. Its belabored argument now made that this frank concession should be construed into a contention that the second sentence of such clause was unlawful, would be even more difficult to present had the Government chosen to quote the more complete and more explicit statement, and accordingly the statement most devastating to its contention, which it made to the trial court. The Government, in addition to the statement it concedes was made, stated to the trial court that the

"only" phase of the cross-license agreement which the Government contended was unlawful was the agreement not to do anything which might restrict the scope of the claims of the other party (Plaintiff's Memorandum Relative to Defendant's Proposed Findings, R. 6195-6196).

It can thus be seen that the Government acknowledges the statement which it thinks it may best argue away but, so far as the Government is concerned, leaves undisclosed and unquestioned its statement that squarely negates the argument it attempts to make.

8. (a) The Government states that in its Jurisdictional Statement it attacks as clearly erroneous the trial court's finding that the phrase "in any country" as used in the first sentence of clause 1 of the Singer-Gegauf license agreement refers only to certain foreign countries and not to the United States (p. 7, n. 3). The trial court made no finding which related merely to the words "in any country." The trial court made separate findings with respect to two entire sentences. Nor did the trial court find that the words "in any country" referred to "certain" foreign countries, which would imply that definite specified countries were referred to. The first sentence of clause 1 relates to *all* countries having invalidation, opposition and nullity proceedings. And the trial court so found (Op. 36a), stating that the provision of the first sentence was interpreted and intended by Singer and Gegauf to mean that neither would file opposition, nullity or invalidation proceedings against the other's applications "in foreign countries where such special proceedings were known."

(b) The Government asserts that Singer's "sole asserted justification" for the trial court's interpretation is that the agreement not to restrict the scope of each other's claims

was intended to apply only in countries having "invalidation, opposition and nullity proceedings in which one may restrict the scope of claims of others" (p. 7, n. 3). The defendant could not have made more clear its contention that the first sentence of clause 1 was intended to be applicable to all foreign countries having *special proceedings* known as invalidation, opposition and nullity proceedings" (Motion to Affirm, pp. 35-39). Our phrase "in which one may restrict the scope of claims of others" is of course a phrase describing the nature of such special proceedings. It in no way limits or qualifies our statement that the first sentence has reference to and is applicable to special proceedings which exist in various foreign countries to restrict the scope of claims.

The Government asserts that a party to an interference proceeding in the United States Patent Office can succeed in restricting the over-all scope of the claims made in his adversary's patent application by proving that the broadest interfering claims in that application are unpatentable (p. 7, n. 3). The Government knows full well that an interference proceeding is not a proceeding that can be brought by any party interested in restricting the scope of a claim. It is not the counterpart and it is not intended to be the counterpart of the type of proceedings that are available in various foreign countries. One has his say in an interference proceeding only if the Patent Office sets up an interference. In the various foreign countries referred to one brings his own proceeding at his own will in special proceedings designed for that purpose (Court's Exhibit 4, R. 5768-5770).

9. The new matter raised in the Government's Brief in Opposition is its statement (p. 6) that the importance

of its third question is "underscored" by the enactment of Public Law 87-831 (76 Stat. 958). That statute has no significance with respect to this litigation. It is purely a disclosure statute and does not declare any form of agreement to be either legal or illegal. The fact that the Government wrote a letter to a Congressional Committee deemed suitable for its purposes in this litigation, and now attempts to use the letter before this Court, in effect, to lift itself by its own boot straps, is of even less significance.

Respectfully submitted,

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November 14, 1962